

FILED

MAY 12 2006

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY: *R. Berglund*

1 IN THE MATTER OF A MEMBER)
2 OF THE STATE BAR OF ARIZONA,)
3)
4 **ROGER K. SPENCER,**)
5 **Bar No. 004618**)
6)
7)
8)
9)
10)
11)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
RESPONDENT.

No. 04-1931

**DISCIPLINARY COMMISSION
REPORT**

7 This matter originally came before the Disciplinary Commission of the Supreme
8 Court of Arizona on April 7, 2006, pursuant to Rule 58, Ariz. R S. Ct., for consideration of
9 the Hearing Officer's Report filed January 26, 2006, recommending censure, two years of
10 probation effective upon the signing of the probation contract including completion of the
11 current Voluntarily Therapeutic Contract with the State Bar's Member Assistance Program
12 (MAP), and costs of these disciplinary proceedings. The State Bar filed an objection and
13 requested oral argument. Respondent, Respondent's Counsel and Counsel for the State Bar
14 were present.

16 The State Bar argues that the sanction of censure and probation is not appropriate
17 under the facts of this case, the ABA *Standards for Imposing Lawyer Discipline*
18 (*Standards*), proportionate case law, and does not serve the purposes of discipline.

19 The State Bar contends that *Standard* 4.61, disbarment, is the presumptive sanction
20 when a lawyer knowingly deceives a client with the intent to benefit that lawyer and with
21 serious actual or potential injury occurring to multiple clients. Respondent falsely billed
22 clients on 166 occasions over a three year period. The State Bar emphasizes that
23 Respondent's misconduct was pervasive and widespread. The State Bar further contends
24 that Respondent's mental state was at least knowing, if not intentional, and he acted with the
25
26

1 intent to benefit himself. According to the State Bar the evidence supports that Respondent
2 falsely billed clients to gain the approval of his own clients and to lessen his anxiety. The
3 State Bar argues that based on the mitigation present, a reduction in the presumptive
4 sanction of disbarment is justified; however, a long term suspension and not censure, is the
5 appropriate sanction.

6 Respondent argues that the State Bar has not previously asserted there was clear
7 error by the Hearing Officer in any of the factual findings involving Respondent's mental
8 state and the Hearing Officer's conclusion that the motivating factor was not to benefit
9 Respondent's financially. Respondent contends that the Hearing Officer's recommendation
10 of censure and probation is appropriately tailored to Respondent's misconduct and that
11 suspension, not disbarment, is the presumptive sanction in light of Respondent's lack of
12 intent to act for personal gain.

13 Respondent further argues that the Hearing Officer appropriately applied aggravating
14 and mitigating factors and gave appropriate weight to those factors. Respondent did not act
15 with a selfish or dishonest motive and the Hearing Officer appropriately considered the
16 imposition of other penalties and sanctions, mitigating factor 9.32(k) as Respondent's
17 resignation constitutes viable evidence of the derivative losses associated with his loss of
18 employment.

19 Respondent argues in closing that the cases offered by the State Bar for
20 proportionality regarding billing improprieties fail to consider the reasons for Respondent's
21 misconduct or his substantial mitigation. These cases are distinguished from the case at bar
22 because the Hearing Officer found that Respondent's misconduct did not result from a desire
23 for personal gain, but instead was caused by the need to quell anxiety and not by the need to
24
25
26

1 obtain money. Respondent maintains that public safety is assured through the recommended
2 sanction of censure and probation.

3 Decision

4 The eight members¹ of the Disciplinary Commission by a majority of seven,² adopts
5 the majority of the Hearing Officer's findings of fact and conclusions of law with some
6 exceptions, and modifies *de novo* the recommended sanction based upon the Commission's
7 proportionality review.

8 Based on a proportionality review of analogous cases, the Disciplinary Commission
9 recommends *de novo* a one year suspension, two years of probation upon reinstatement with
10 length and terms to be decided upon reinstatement, a practice monitor, and costs of these
11 disciplinary proceedings.

12 Discussion

13 The Disciplinary Commission's standard of review is set forth in Rule 58(b), which
14 states that it applies a clearly erroneous standard to findings and reviews questions of law *de*
15 *novo*. The Commission historically gives great deference to the Hearing Officer's Report
16 and recommendation. *Matter of Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1989).

17 The Commission, as well as the Hearing Officer, found clear and convincing evidence
18 that Respondent violated Rule 42, Ariz.R.S.Ct., specifically ERs 1.4, 1.5, 4.1, and 8.4(c).
19 Respondent engaged in a prolonged pattern of misconduct by making improper transfers and
20 falsely billing numerous clients for costs and fees not associated with their cases.
21

22 In determining the appropriate sanction, our Supreme Court considers the ABA
23 *Standards for Imposing Lawyer Sanctions* ("Standards") a suitable guideline. *In re Kaplan*,
24

25
26 ¹ Commissioner Flores did not participate in these proceedings.

² Commissioner Osborne was opposed and believed disbarment was appropriate.

179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Disciplinary Commission are consistent in utilizing the *Standards* to determine appropriate sanctions for attorney discipline. In imposing a sanction after a finding of misconduct, consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating and mitigating factors. *See Standard 3.0*.

Absent aggravating or mitigating circumstances, upon application of the factors set forth in *Standard 3.0*, the following is generally appropriate in cases where the lawyer has engaged in fraud, deceit, or misrepresentation directed toward a client, a violation of ER 8.4(c):

Standard 4.62 Lack of Candor provides that:

Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

The record supports that Respondent knowingly engaged in a pattern of misappropriation of client funds and caused clients to pay for legal services that they did not receive. The transfers were made to relieve his anxiety about a client rejecting him, rejecting payment of a bill, or firing him if they received an accurate bill. *See Hearing Officer's Report*, p. 9, finding of fact \$23.

The State Bar maintains that Respondent's actions were at least knowing if not intentional. Our Supreme Court instructed us in *Matter of Arrick*, 180 Ariz. 136, 882 P.2d 943 (1994), that mental impairment may impact intent. The Commission therefore cannot find clearly erroneous the Hearing Officer's finding that Respondent's mental state was knowing. *See Hearing Officer's Report*, p. 8, finding of fact #21.

Three medical experts testified that Respondent's mental disability was instrumental in causing his misconduct. Respondent's expert, Dr. Steven Pitt, a forensic psychiatrist, testified that he did not have enough information to diagnose Respondent with a personality disorder, but he believed Respondent suffered from narcissistic and obsessive-compulsive personality traits. He further testified that while he did not believe Respondent's misconduct was impulsive, the misconduct was not committed with the intent to harm others. With appropriate safeguards and a continued treatment plan, Dr. Pitt considered Respondent's long term prognosis guarded, but he was cautiously optimistic that Respondent would not engage in recidivism. In closing, Dr. Pitt concluded that Respondent's mental disability was principally responsible for the misconduct.

Respondent's treating psychiatrist, Dr. Lisa Jones, opined that Respondent has a narcissistic and obsessive-compulsive personality disorder. (Upon Dr. Pitt's recommendation, Respondent had begun weekly psychiatric counseling with Dr. Jones and attended a week-long intensive therapy program at The Meadows in Wickenburg.)

Respondent was also evaluated by Michael A. Sucher, M.D., Medical Director of the State Bar's Member Assistance Program and by Hal M. Nevitt, Director of the State Bar's Member Assistance Program.

The State Bar's medical expert, Dr. H. Daniel Blackwood, Ph.D., opined that Respondent suffers from a narcissistic personality disorder and testified that there is nothing about Respondent's condition that would have prevented him from acting knowingly. Dr. Blackwood testified that he did not think the personality disorder prevented Respondent from acting with full intent, full awareness of his actions, and potential consequences of his actions. Respondent understood the difference between right and wrong and could control

his actions. Dr. Blackwood further testified that Respondent's mental disability substantially contributed to the misconduct and the misconduct was unlikely to recur, assuming that Respondent continued treatment and was monitored.

The Disciplinary Commission, as well as the Hearing Officer, having concluded that suspension is the presumptive sanction, reviewed *Standards* 9.22 and 9.32, aggravating and mitigating factors respectively, to determine if a reduction of the presumptive sanction is justified.

The Commission agrees with the Hearing Officer that aggravating factors 9.22(c) pattern of misconduct, 9.22(d) multiple offenses, and 9.22(i) substantial experience in the practice of law, are present. The Commission finds *de novo* that aggravating factor 9.22(b), dishonest or selfish motive, is also supported by the record. The evidence shows that Respondent knowingly, for a period of over three years, falsely billed clients to alleviate his anxiety. Respondent has a narcissistic and obsessive-compulsive personality disorder, but a personality disorder does not interfere with the cognitive ability to distinguish between right and wrong. Respondent understood the difference between right and wrong and could control his actions. See Hearing Officer's Report, pp. 17-18. The Commission finds clearly erroneous the finding that Respondent acted without a dishonest or selfish motive. A desire to quell personal insecurities without a doubt is a selfish and dishonest motive.

The Commission agrees with the Hearing Officer that mitigating factors 9.32(a) absence of a prior disciplinary record, 9.32(c) personal or emotional problems, 9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings, 9.32(i) mental disability, and 9.32(l) remorse are supported by the record.

1 However, the Hearing Officer was clearly erroneous in finding that mitigating factor
2 9.32(k) imposition of other penalties and sanctions is present. Respondent's resignation
3 (perhaps forced) from his law firm is not a sufficient ground for a finding of other sanctions
4 and penalties. See Hearing Officer's Report, p. 23. This factor is normally found when a
5 court has ordered penalties for contempt or imposed other sanctions that have been satisfied.
6 See *Matter of Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993).

7 The Hearing Officer further erroneously concluded that mitigating factor 9.32 (d)
8 (timely good faith effort to make restitution or to rectify consequences of misconduct) is
9 present. The Hearing Officer found that Respondent reimbursed his firm in full for the
10 restitution payments made by the firm to the affected clients; however, forced restitution is
11 considered neither aggravating nor mitigating. See Hearing Officer's Report, p. 14, finding
12 of fact #38 and *Standard* 9.4. The record shows that Respondent's firm withheld the funds
13 from Respondent's equity account when he terminated his association with the firm.

14 Sanctions against lawyers must have internal consistency to maintain an effective
15 and enforceable system; therefore, the court and the commission look to cases that are
16 factually similar to cases before them. *Matter of Pappas*, 159 Ariz. 516, 526, 768 P. 2d
17 1161, 1171 (1988).

18 Based on a proportionality analysis of previous cases with similar misconduct, the
19 Disciplinary Commission found *Matter of Delgado*, SB-97-0091-D (1998) most analogous.
20 Delgado falsely billed his firm for work and travel that was not performed. Delgado caused
21 himself to be "reimbursed" for travel that did not occur and paid for work that was not
22 performed. The amounts misappropriated were not significant; however, Delgado received
23 an 18 month suspension, conditional upon successful completion of MAP, because he failed
24
25
26

1 to establish that he had been rehabilitated from alcoholism and depression.³ The
2 Commission finds that Respondent similarly caused clients to be falsely billed for expenses
3 and services. While his motivation was not financial gain, it was unquestionably personal
4 gain.

5 The Hearing Officer gave great weight to *Matter of Cotton*, SB-01-0036-D (2001).
6 Cotton submitted unauthorized charges to his firm for personal expenses and per diem
7 charges that had not been approved or even incurred. Cotton however, acted with a
8 negligent mental state and the matter is therefore of little instructive value to the
9 Commission.

10 Conclusion

11 One purpose of lawyer discipline is to deter the respondent and other attorneys from
12 engaging in similar unethical conduct. *In re Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982).
13 Another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180
14 Ariz. 20, 29, 881 P.2d, 352, 362 (1994). In addition, the sanction that we imposed must help
15 maintain the integrity of the legal system. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d
16 1315, 1320 (1993).

17
18 Based on our findings and conclusions, application of the *Standards* and a
19 proportionality analysis, the Disciplinary Commission recommends a one year suspension,
20 two years of probation upon reinstatement, including a practice monitor, with the length and
21 terms to be decided in reinstatement proceedings, and costs of these disciplinary
22
23

24
25 ³ If MAP was not successfully completed, an additional 18 month suspension would be imposed.
26 Delgado was also ordered to pay restitution and upon reinstatement, two years of probation was
imposed for violating ER 1.3, 1.5, 4.1, 8.4 and 8.4(c). In aggravation were factors 9.22(b), (c), (d),
and (j). In mitigation were factors 9.32(a), (c), (e) and (f)

proceedings.

1 RESPECTFULLY SUBMITTED this 12th day of May, 2006.

2
3
4 Barbara A. Atwood *kw*

5 Barbara A. Atwood, Chair
6 Disciplinary Commission

7 Original filed with the Disciplinary Clerk
8 this 12th day of May, 2006.

9 Copy of the foregoing mailed
10 this 12th day of May, 2006, to:

11 Stephen L. Weiss
12 Hearing Officer 9Z
13 P.O. Box 36940
14 Phoenix, AZ 85067-6940

15 J. Scott Rhodes
16 Respondent's Counsel
17 *Jennings, Strouss & Salmon, P.L.C.*
18 Collier Center, 11th Floor
19 201 E. Washington Street
20 Phoenix, AZ 85004

21 Amy K. Rehm
22 Senior Bar Counsel
23 State Bar of Arizona
24 4201 North 24th Street, Suite 200
25 Phoenix, AZ 85016-6288

26 by: K. Weigand

/mps